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OCTOBER TERM, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF UNITY REAL ESTATE COMPANY, BARNES & TUCKER COMPANY AND MARY HELEN COAL CORPORATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, as applied, violates the Due Process Clause and the Takings Clause of the Fifth Amendment?

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BRIEF *AMICI CURIAE* OF UNITY REAL ESTATE COMPANY, BARNES & TUCKER COMPANY AND MARY HELEN COAL CORPORATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

Two of the *amici*, Barnes and Tucker Company ("B&T") and Mary Helen Coal Corporation ("Mary Helen"), once mined coal under collective bargaining agreements with the United Mine Workers, but ceased doing so long before the enactment of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"). The third *amicus*, Unity Real Estate Company ("Unity"), never engaged in coal mining, but is a "related party" under the Coal Act because of its relationship with companies that years ago mined coal under collective bargaining agreements with the UMWA.

Each of the *amici* will suffer the total loss of all its assets as a consequence of the Coal Act assessments imposed on it based on events that occurred years before the Coal Act became law. They submit this brief to present the Court with a situation the court below specifically distinguished — namely, a complete confiscation of all of a company's assets — and to show that rationality would no longer be an element of taking and due process analysis if the Coal Act is determined to be constitutional.

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[1] Each of the parties has consented to the filing of this brief. A copy of the letter from each party has been filed with the Clerk of this Court in accordance with Rule 37.3. No person other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6. The brief was not authored in whole or in any part by counsel for a party. Rule 37.6.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Coal Act as applied to Eastern Enterprises ("Eastern") and to the *amici*. The *amici*, like Eastern, either are or were related to companies that ceased to engage in coal mining well before the Coal Act was passed.

Though there are additional factors, the Coal Act works an unconstitutional taking as well as a denial of due process for two primary reasons. The first is that the Act is utterly irrational. It establishes a health plan by which former coal operators must pay benefits for health problems that have nothing whatever to do with mining. The benefits are exacted retroactively from companies that have ceased mining altogether, and did so, in some cases, decades ago. A man may have worked in a union mine for a company two days twenty years ago. The company may have quit mining ten years ago. But, if he is run over by a truck tomorrow, the coal operator must pay his medical expenses, and for the medical expenses of his dependents and survivors. In some cases, the beneficiary has *never* been employed by the assessed entity. No decision of this Court has ever gone so far as to find such a scheme rational. If it were upheld, the rationality element of taking and due process analysis would drop out of the law altogether.

Second, the payments irrationally and retrospectively extracted from mine operators who have left the industry work a severe financial hardship. These *amici*, Unity, B&T and Mary Helen, for example, have not mined coal for years but they will be obliterated, all of their assets completely confiscated, by the payments required of them by the Coal Act. No harsher or more unjust result can be imagined. If this is not

a taking within the meaning of the Fifth Amendment, nothing is.

The history underlying the Coal Act is quite simple.

In 1946, following a strike in the coal industry, President Truman ordered the Secretary of the Interior to seize the coal mines and negotiate changes in the terms and conditions of employment with the United Mine Workers of America (the "Union").

The Secretary and the Union created a multiemployer welfare and retirement fund to provide miners with health benefits funded through payroll deductions. The mines were returned to the operators in 1947. The Union and a committee of the coal operators negotiated the first National Bituminous Coal Wage Agreement (the "1947 Agreement"), which created a new multiemployer union welfare and retirement trust (the "W&R Fund"). Signatory employers of Union miners agreed to pay a fixed royalty only during the life of the 1947 Agreement for every ton of coal produced or sold. The W&R Fund gave the trustees discretion to decide the benefits provided.

A new W&R Fund was established in 1950, under which the coal operators paid set amounts to the Fund, again only during the period of the Agreement they signed. No benefit levels were guaranteed. Beneficiaries were told that benefits were revocable and not vested. The Fund trustees frequently exercised their authority to revise eligibility requirements and to alter, rescind, or reduce particular benefits.

Every court that has addressed the question has concluded that coal operators that permanently ceased mining

bituminous coal were not liable for any retiree health benefits beyond the term of the last agreement they signed.[2] The Trustees conceded the point in *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366 (E.D. Va. 1997). The facts in Mary Helen's case were indistinguishable from those in the case of either of the other two *amici*, B&T and Unity; consequently, the same conclusion should follow in those cases.

This situation remained essentially unchanged for almost a quarter of a century, until the Employee Retirement Income Security Act of 1974 caused the Bituminous Coal Operators Association ("BCOA") and the Union to enter into the 1974 Agreement, which differed substantially from previous agreements. Four new trusts, two of which were benefit plans, succeeded to the 1950 W&R Fund. The new UMWA 1950 Benefit Plan provided health benefits for pre-1976 retirees. The new UMWA 1974 Benefit Plan initially provided health benefits to miners who retired in 1976 or thereafter.

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[2] See *LTV Steel Co. v. UMWA (In Re Chateaugay Corp.)*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992), and cases cited therein. *UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993), *cert. denied*, 509 U.S. 924 (1993), is not to the contrary. This case held that trust documents incorporated into the Agreements included a clause — the so-called evergreen clause — that required employers to continue to contribute at the rates in the new national Agreement, even if it did not sign that Agreement. This obligation, however, applied only to employers that continued to be "engaged in the production of coal," since contributions were based solely on hours worked or tons produced. 984 F.2d at 474 n.5.

In 1978, the BCOA and the Union entered into a new agreement, the first that obligated signatory operators to make higher contributions to the Benefit Plans should that be necessary to guarantee sufficient funds for medical costs incurred during the term of that 1978 Agreement. The 1978 Agreement also required signatory operators to provide retiree medical benefits directly to their own post-1975 retirees, but only during the term of the Agreement. Agreements signed in 1981, 1984, and 1988 also contained similar clauses.

The Coal Act of 1992 extended liability to every coal operator that had ever operated under any Agreement with the Union — that is, any Union agreement from 1946 to 1988. Liability was imposed whether or not the coal operator was still in the industry, had signed any agreement after 1947, or had employed the benefits claimant at all. In fact, the Act imposed liability for the claims of individuals (*e.g.*, dependents) who never worked in a mine nor had any disease or injury that had anything to do with mining.

The consequences are often devastating. As noted, the government has taken or will take *all* of the assets — assets wholly unrelated to mining — of these three *amici*. These companies face extinction.

SUMMARY OF ARGUMENT

The Coal Act, as applied to the petitioner and the *amici*, constitutes an uncompensated taking and a violation of due process. The Court has never upheld a governmental action as extreme as that attempted here. The reach of the Coal Act's retroactivity is unprecedented. The oppressive burden it imposes on former coal operators to fund general health benefits for retired coal miners and their dependents bears no

rational relationship to the coal operators' employment of these beneficiaries. In the case of these *amici*, the effect is to confiscate all of their assets and extinguish them entirely.

If this governmental action is upheld, there would remain no limit on the government's power retroactively to appropriate the assets of some for the benefit of others.

ARGUMENT

The Judgment Below Should Be Reversed Because the Coal Act Takes Petitioner's and *Amici*'s Property for Public Use Without Just Compensation and Deprives Them of Due Process

Four factors are of particular significance in analyzing a taking or due process claim: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct, investment-backed expectations; (3) the character of the governmental action; and (4) the requirement of a rational relationship between what the government does and what its purported purpose is. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-38 (1978); *see also, Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-27 (1976). Of these, the most important factor in the present case is the lack of any rational relationship between the liabilities imposed by the Coal Act and any legitimate purpose.

A. The Coal Act's Retroactive Liability for a Broad Array of Non-Mining-Related Benefits Bears No Rational Relationship to Any Legitimate Governmental Purpose

The Coal Act provides health care payments for all of the health problems of past UMWA miners, their dependents, and their survivors. The health problems covered need have no relationship whatever to any work in the mines. A Union member who worked two hours total for a mine operator in 1950 is entitled to impose his health care costs on that coal operator if he is later run over by a truck. In addition, he may have his dependents' bills paid and, if he dies, his survivors' bills paid.[3] And this obligation of the operators is forced upon them even though they never employed the dependents in question and left the industry long before the government imposed this extraordinary financial obligation upon them.

This governmental action is thus far more irrational in its retroactivity and in other respects than any program this Court has previously examined. Whatever their differences in other respects, both the Due Process Clause and the Taking Clause of the Fifth Amendment require that there be a rational relationship between government action and the purpose intended to be served. That is shown by a comparison of *Usery, supra,* 428 U.S. 1, with this Court's taking decisions. *Usery* involved a due process challenge by coal mine operators

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[3] Although a miner generally had to have worked a minimum number of years to be eligible for benefits from the prior Benefit Plans and W&R Fund, employment with operators that are no longer in business is disregarded under 26 U.S.C. § 9706(b)(1). Therefore, even minimal employment can result in complete responsibility for the health benefits of a miner and his dependents under the Coal Act.

to the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act of 1972 ("BLBA"), which required coal operators to compensate former employees who finished their work in the industry before the BLBA was passed. In upholding a major provision of the statute, the Court said:

> To the extent that the presumption of death due to pneumoconiosis [black lung disease] is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner — by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a `cost' of the operator's business.

428 U.S. at 24-25.

The Court found a rational relation between the business and the presumption of death due to pneumoconiosis, but for reasons wholly absent from the present case. If a miner died with, but not from, pneumoconiosis *before* the BLBA was passed, the benefits were deferred compensation for the suffering endured by his dependents. If such a miner died *after*

the BLBA was passed, the benefits had the additional purpose of letting him know that his dependent survivors would receive benefits. That knowledge compensated him for his suffering.

> In short, [the statute's] presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems . . . .
>
> We might face a more difficult problem in applying [the statute's] presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness.

428 U.S. at 25-26.

But even this extremely tenuous relationship between work as a miner and a particular illness is absent in the present case. Eastern and the *amici* are required to pay huge sums of money on account of miners, dependents, and survivors who had no illness attributable to mining, but had unrelated problems, such as being injured or killed in a motor accident.

There is *no* rational relationship between mining and most, if not all, of the health payments made. That a former employee is hit by a truck is not a cost of the coal operator's doing business, and paying to have a cast put on the man's leg does not "spread costs in a rational manner." This provision of the Coal Act is equivalent to Medicare and Medicaid — except that the cost must be paid by mine operators who had no more to do with the injury or illness than any other taxpayer.

The only connection between an operator and the beneficiary — prior employment of a member of the beneficiary's family — is an arbitrary basis upon which to rest retroactive liability of the sort imposed here. First, as explained above, the employment itself did not cause any harm or injury. Second, there is no sensible correlation between the employment and the liability imposed; the liability is the same regardless of whether the operator employed the miner for one day, one year, or thirty years, and takes no account of whether a miner's dependents were even alive during the miner's employment.[4]

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[4] For example, Eastern's liability for a miner who has two dependents, but who worked only one day for it, is exactly the same as its liability for a miner who also has two dependents, but who worked for it for twenty years. Indeed, Eastern's liability for a miner who worked for it for one day and has two dependents may actually be greater than its liability for a miner who has no dependents, but who worked for it for 40 years. Thus, there is absolutely no proportionality whatsoever between the liability imposed and the operator's prior employment of the miners on which that liability is based. As of December 31, 1996, more than 72% of the Combined Fund's beneficiaries never worked in any coal mine for any employer. Instead, they are spouses and dependents of former mine workers. Thus, whatever the health care needs of the overwhelming majority of the beneficiaries may be, they certainly

Moreover, the cases upholding the constitutionality of retroactive legislation do so on the basis that some past "wrong" requires present corrective action. This is true of both the Black Lung and the CERCLA cases. In each, there had been a past event — exposure of workers to coal dust or contamination of the environment with long-lasting hazardous waste — that may not have been known at the time to be injurious, but came to be recognized as such with advancements in science and technology. When Congress acted in those instances, it did so to remedy the present negative consequences of past wrongful conduct. Similarly, when Congress enacted the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 ("MPPAA"), it did so to correct a deficiency in its earlier legislation regulating pension plans, which actually created an undesirable incentive for employers to withdraw from multi-employer plans. When Congress acted to correct its own inadvertence, it imposed only a short period of retroactivity to foreclose additional hasty withdrawals during the legislative process. In the cases of Eastern and the *amici*, however, there is no past "wrong" whatever to justify an extraordinarily long retroactivity.

The requirement of a rational connection is the crux of this Court's leading taking cases: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-41 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386-91 (1994).

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bear no connection at all to employment with Eastern or these *amici*, or with any other former signatory. Nevertheless, Eastern or these *amici* bear the full cost of health benefit premiums for every non-employee beneficiary assigned to them.

In *Nollan*, the Commission gave permission for the Nollans to rebuild and enlarge a house on their beachfront property upon condition that the Nollans transfer to the public a lateral easement along the beach to connect two pieces of public beach. The Commission stated that this condition promoted the legitimate state interest of diminishing the blockage of the public's view of the ocean caused by the new construction. In ruling for the Nollans, this Court noted that a permanent physical occupation of the beach had occurred, but also ruled that there was no nexus between the condition imposed and the government's purported goal. There was no relationship between the public's ability to see the ocean from the road and the easement over the beach.

Dolan displayed a greater correspondence between the government's goal and the condition it sought to impose, but this Court ruled that a taking had occurred nonetheless. Dolan sought a permit to increase the size of her store. In return, the city demanded that she dedicate part of her property for flood control and improvement of the drainage system and another part, a 15-foot strip, for a public pedestrian and bicycle path. The Court first asked "whether the `essential nexus' exists between the `legitimate state interest' and the permit condition exacted by the city." 512 U.S. at 386. The Court said that a "rough proportionality" was necessary. While the law already required that Dolan leave 15% of her lot as open space, the city wanted her property, but had never said why public rather than private ownership was relevant to flood control. The same defect vitiated the city's demand for the dedication of land for a recreational pathway: there was no showing that the additional number of trips generated by Dolan's development would reasonably relate to a pathway easement.

These cases make it undeniable that the government's appropriation of property for itself or for others must bear at least a rough proportionality to a legitimate state interest. The government has not made, and cannot make, that showing with respect to the Coal Act's retrospective imposition of liability upon coal companies to pay for all of the assorted health problems a former miner, or his dependents and survivors, might encounter. Since there is no requirement that the health problems be related to work in a mine, the situation is no different than if Congress passed a statute making liable existing and former law firms for the health care of all persons, their dependents and survivors, who had ever worked in any capacity in any law firm. There is no rational connection between the liability and the health problems. If there need be no relationship between employment and an employee's illness, Congress could with equal validity make all present and former law firms liable for the health care of all former farmers, their dependents and their survivors. In this respect, the Coal Act's only rationale is the desire to benefit one group at the expense of another, although no relationship exists between the second group's problems and the first group's conduct.

The length of the period of retroactivity here is without precedent. The irrationality of the Coal Act's retrospective reach cannot be cured by arguing that it merely codifies the contractual obligations already existing between miners and the former coal operators. This is not a contract case. If it were, this Court would never have agreed to hear it.[5] More to the point, each Agreement between the Union and the BCOA

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[5] Indeed, if such a contractual obligation had existed, then there would have been no need for the Congress to enact the Coal Act.

explicitly stated that the obligation of the coal operators to fund health benefits ended with the termination of the Agreement.

For this reason, miners could not have developed reasonable expectations of lifetime health care on the basis of any of the Agreements, particularly from operators that left the industry and were no longer signatory to any such Agreements long before the Coal Act was even considered by Congress. The only reasonable expectation the miners could have had was that those operators who remained in the industry and continued to sign Agreements would pay for their benefits as part of the quid pro quo for the services the operators received from their current employees. That was what the miners had experienced for the past fifty years, and that is what had been found by every court to have considered the issue.[6] Indeed, although the Court upheld the imposition of retrospective liability in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *Usery, supra*, 428 U.S. 1, neither of the statutes involved in those cases imposed liability on employers that withdrew from the plan or industry well before the respective statutes were passed. MPPAA did not impose any liability on employers who withdrew prior to the time the act was first being considered, *Gray*, 467 U.S. at 730-31, and the BLBA did not impose any liability on employers who did not continue to operate coal mines after a specified post-enactment date (June 30, 1973), 30 U.S.C. § 932(a) and 20 C.F.R. § 725.492(a)(2).

Nor can it be said that petitioner and the *amici* contributed to the Fund's financial problems by withdrawing from the industry. Eastern and these *amici* had fully paid their obligations under all Agreements and statutes in effect at the

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[6] *See* footnote 2, *supra*.

time they ceased mining coal and left the industry. The district court in amicus Mary Helen's case said that "Congress has merely enacted legislation to ensure the continuation of health benefit programs from which many operators, including Mary Helen, try to walk away." *Mary Helen Coal Corp., supra,* 976 F. Supp. at 374. The argument erroneously assumes that one can walk away from an "obligation" that does not exist.

The district court's implicit rationale is that: (1) no operator can leave the industry, no matter how unprofitable its operations, and no matter that it has no further contractual or statutory obligations to pay benefits; (2) once the BCOA makes an Agreement with the Union, however limited in its terms it may be, all signatory operators are required to stay in the industry and keep accepting future Agreements even if they are no longer mining coal and could not do so profitably, or, indeed, even if they have no coal to mine; and (3) otherwise, they will be held responsible for any shortfall in benefits. Any such rule would amount to a new form of involuntary economic servitude. That is an erosion taking and it is forbidden. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 122-25 (1974); *Railroad Comm'n of Texas v. Eastern Texas R.R. Comm'n*, 264 U.S. 79, 85 (1924); *Bullock v. Florida*, 254 U.S. 513, 520-21 (1921); *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 398-99 (1920).

Justice Holmes' opinion for the Court in *Brooks-Scanlon*, answering the argument that a money-losing railroad could be compelled to continue in business if other business of the corporation allowed the combined enterprise to show a profit, might have been written for petitioner and the *amici* here: "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." 251 U.S. at 399.

B. The Character of the Governmental Action Is the Permanent Appropriation of the Funds and Assets of Petitioner and the *Amici* by the Imposition of Retroactive Liability for Problems Not of the Companies' Making

There is no conceivable argument, much less a rational one, that petitioner and the *amici* somehow created diseases and injuries that are in no way related to mining. Yet, the government would commandeer the companies' funds and assets — and in the case of these *amici*, all of their funds and assets — to pay the costs of such diseases and injuries.

The Coal Act requires that these *amici* sell off all of their assets and be left with nothing in order to pay the obligations retroactively imposed upon them. When their assets are entirely exhausted, these companies will still owe great sums. The patent injustice and novelty of that result is no doubt one reason this Court has not yet had to face the question whether the government may retroactively take *all* of a firm's assets. *See, e.g., Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 643-45 (1993). That is why the taking of all the assets of each of these *amici* distinguishes this case from *Concrete Pipe*. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (government action that results in deprivation of all economically beneficial or productive use of property is a categorical taking). This is an additional reason why these *amici* should be relieved by constitutional mandate from the draconian retroactivity of the Coal Act.

C. The Adverse Economic Impact and Interference with Investment-Backed Expectations of the Coal Act upon the Petitioner and the *Amici* Is Enormous

The impact on each of these three *amici* is total and devastating.

Unity is a small company that owns and leases space in an office building and a parking lot. Unity was never directly involved with the coal industry. Its liability under the Coal Act arises as a "related person" to two entities — a company that ceased its coal industry operations in 1960 and was merged into Unity in 1969, and a subsidiary formed in 1974 that was liquidated in bankruptcy in 1981. Unity's total assets when the Coal Act became law in 1992 — the small commercial building and adjacent parking lot mentioned above — are worth approximately $85,000.00, and generate total annual revenues of only $50,000.00. From these revenues, Unity must pay the salary of one employee, maintenance costs, and real estate and other taxes, prior to any return to stockholders. Nevertheless, Unity's Coal Act liabilities for the first full Plan year alone exceeded $266,000.00. Unity has not made, and cannot make, any of the onerous payments required by the Coal Act, and its liabilities — $771,443.30 as of November 25, 1997 — will continue to grow at the rate of $12,568.97 per month, with no end in sight short of surrendering to the Trustees everything it owns.

In 1986, B&T permanently ceased mining and selling coal and five individuals purchased its stock. At that time, B&T was adequately capitalized to provide indefinitely for the payment of more than $25,000,000 to hundreds of workers' compensation and black lung claimants, and to pump and treat

more than 10 million gallons of acid mine discharge daily, and to provide its shareholders a return on their investment. B&T's Coal Act liabilities, however, far exceed its assets. Its assets are being totally consumed to make the onerous payments demanded by the Coal Act. B&T's Coal Act liabilities – it has paid a total of $12,619,327.00 through November, 1997, and is continuing to pay at a rate of $2,626,212.00 per year (which exceeds its annual gross revenue by more than 100%) – will consume the totality of its remaining assets in less than two years, leaving it unable to provide for its pre-Coal Act employee-related and environmental liabilities. Thus, B&T will shortly lose everything it owns to the Trustees.

Mary Helen began mining in 1921, but heavy operating losses due in major part to increasing labor costs caused it to lease or assign all of its mineral rights and to sell all of its mining equipment to an unrelated third party in 1963. Mary Helen then derived most of its revenues from royalties paid by its lessee, but in 1995 the lessee stopped royalty payments because no more coal could profitably be extracted from Mary Helen's land. The total market value of Mary Helen's assets, including land, approximates $1,650,000. In 1997, the Trustees obtained a judgment of $895,357.81 against Mary Helen for past due Coal Act assessments. The monthly assessment was then $49,234.66. Meeting it would require the company to earn 67% or more on its assets, without regard to other expenses. That is a plain impossibility, and Mary Helen will exhaust its real and personal property in a matter of months.

These three companies are suffering an unconstitutional taking under any test. The government's action here certainly does not pass the "just and reasonable" test of *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope* teaches that after the government has acted:

> [I]t is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock . . . . By that standard the return to the equity owners should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and to attract capital.[7]

Clearly, the just and reasonable test is not met as to the three *amici* who will lose all of their assets by operation of the Coal Act.

Eastern, while it does not face imminent insolvency, is otherwise in the same position as the three *amici* just discussed. The Coal Act's economic impact upon it and the defeat of its investment-backed expectations has been and will be severe, and its investment-backed expectations will be drastically damaged without rational justification.

The financial prospects for affected companies can only get increasingly worse. The burden created by the Coal Act

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[7] *Id.* at 603. *Hope* involved the construction of a federal statute, but also a due process challenge. The Court concluded that the constitutional requirements were no more exacting than the statutory requirements; consequently, conformance by the government with the statute means that it "does not run afoul of the [Due Process Clause]." *Id.* at 607. *See Dusquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (noting the constitutional dimension of *Hope*).

will undoubtedly drive many smaller companies out of business and appropriate all of their assets. This will increase the number of unassigned miners and dependents whose lifetime benefits for non-mine-related injuries and diseases must be paid by a decreasing number of operators. More companies will then have all of their assets taken.

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No decision of the Court upholds a governmental appropriation of private property as extreme as that the government attempts here. All of the factors that guide takings and due process analysis under the Fifth Amendment demonstrate the constitutional invalidity of the Coal Act's retrospective sweep here. If there remain any limits to the government's power retroactively to appropriate the assets of some for the benefit of others, this case easily surpasses those limits.

CONCLUSION

The Coal Act as applied to Eastern and to the *amici* violates both the Takings Clause and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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